

necessary to allow independent manufacturers some opportunity to develop products that can interoperate with carrier-provided transmission service.

III. SUPPORTERS OF THE COMMISSION'S ALTERNATE PROPOSAL HAVE FAILED TO RECOGNIZE ITS SERIOUS DEFICIENCIES

The Commission's alternate proposal would allow interexchange carriers to provide bundled interexchange service/CPE packages, provided that they continue to give customers the option of obtaining unbundled interexchange service on a non-discriminatory basis. Although more than a dozen commenters expressed support for this proposal, none provides more than the most cursory analysis of the complex legal, economic, and policy issues.⁶² Indeed, nearly all advocates of the alternate proposal devoted less than two pages to this issue.⁶³

⁶² As with the Commission's principle proposal, the comments do not demonstrate that the alternate proposal would provide any benefit that currently cannot be obtained in a manner that is consistent with the No-Bundling Rule. See supra § I. Moreover, supporters of the alternate proposal have failed to address numerous issues raised by this approach. For example, no supporter of the alternate proposal addressed the question of whether the alternate proposal is lawful under Section 202 of the Communications Act. Compare IDCMA Comments at 39-40. Nor did any of these parties seek to reconcile the inconsistency between this approach and the unbundling policy expressed by Congress in Section 304 of the Telecommunications Act. Compare id. at 20-21. And no commenter sought to assess the effect of the Commission's proposal to eliminate tariffing in the interexchange market on the agency's ability to enforce the requirement that carriers offer unbundled basic transmission service on a non-discriminatory basis.

⁶³ See Comments of Frontier at 7-8; Comments of General Communication, Inc. at 5-6; Comments of GTE at 10-11; USTA Comments at 3-4; Comments of Pacific Telesis Group at 11-12; NYNEX Comments at 5-7; Bell Atlantic Comments at 5-7; Comments of SBC Communications at 6-8; Comments of the Telecommunications Resellers Association at 40-42; Comments of the Tennessee Attorney General at 5-6 (filed Apr. 25, 1996); Comments of LDDS WorldCom at 17-19 (filed Apr. 25, 1996); The Office of the Ohio Consumers' Counsel's Initial Comments on Regulatory Forbearance for Tariff Filing Requirements at 8-9 (filed Apr. 25, 1996).

In contrast, IDCMA, CERC, and ITAA provided well-reasoned justifications for their opposition to the Commission's alternate proposal.⁶⁴ Most of the objections to the Commission's primary proposal also apply to the alternate proposal. A few, however, warrant special comment. IDCMA and ITAA noted that, because interexchange carriers retain at least a degree of market power, they are able to sustain prices for interexchange service at levels that are at least modestly above cost.⁶⁵ Given that the cost of CPE accounts for only a small portion of the total cost of a services/CPE solution, they further explained, a modest increase in the prices of transmission service would generate a sufficient amount of revenue to allow a carrier to provide "free" CPE to their transmission service customers.⁶⁶ The end-result, as ITAA perceptively noted, is that "customers that do not buy a bundle of CPE and service [would] be forced to subsidize customers that do "⁶⁷ At the same time, independent manufacturers -- who lack the ability to engage in cross-subsidization -- would be placed at an insurmountable competitive disadvantage.

The comments filed by the supporters of the alternate proposal do not address -- much less attempt to disprove -- the plausibility of the scenario described by IDCMA, CERC, and ITAA. To the contrary, the fact that most rebundling advocates prefer the alternate proposal proves that IDCMA's fears are well-founded. If supporters of the alternate proposal believed that the interexchange market is truly competitive, they would be confident that, if consumer

⁶⁴ See IDCMA Comments at 39-42; CERC Comments at 12-14; ITAA Comments at 4-5.

⁶⁵ See IDCMA Comments at 18 n.44; ITAA Comments at 5 n.7.

⁶⁶ See IDCMA Comments at 41.

⁶⁷ ITAA Comments at 4-5; see also CERC Comments at 13.

demand for unbundled services existed, carriers would provide it. The fact that most of the rebundling advocates believe it is necessary for the Commission to require carriers to provide an unbundled option means that these parties believe that interexchange carriers retain at least a degree of market power.

If interexchange carriers retain a degree of market power, however, then merely imposing a requirement that carriers offer an unbundled transmission service option is not adequate to preserve competition in the CPE market. Even if carriers complied with this requirement, they could still use their market power to engage in the very conduct -- supra-competitive pricing of interexchange service and cross-subsidization of CPE -- that IDCMA, CERC, and ITAA predicted. This would reduce competition and decrease user choice.⁶⁸

Advocates of the alternate proposal also assume -- without providing analysis -- that requiring carriers to offer an unbundled transmission service option would be sufficient to satisfy the United States' obligation under GATS and NAFTA to allow ESPs and other users to attach CPE to the network. As explained above, however, the alternate proposal would allow a carrier to use revenue from its transmission service to provide customers with "free" CPE. As a practical matter, this approach would inhibit ESPs and other users from purchasing and

⁶⁸ A number of commenters noted that the alternative approach has been used in the cellular CPE market, see, e.g., Comments of Bell Atlantic at 5-6; MCI Comments at 24 n.37; U S WEST, Inc. Comments at 7-8. None of these parties, however, attempted to demonstrate why -- notwithstanding the differences between the cellular and the interexchange services markets -- the Commission's bundling policies in the cellular market provide an appropriate model for the interexchange model. Compare IDCMA Comments at 40-41.

attaching user-provided CPE to the network. Adoption of the alternate proposal, therefore, also would violate the binding obligations undertaken in GATS and NAFTA.⁶⁹

Even if adoption of the alternate proposal were permissible under GATS and NAFTA, however, it should be rejected. As IDCMA demonstrated in its initial comments, adoption of this proposal would harm U.S. trade policy.⁷⁰ Carriers in several countries have attempted to obtain an unfair competitive advantage by offering bundled service/CPE packages at the same price as the underlying transmission service. The U.S. Government has devoted substantial efforts to convince foreign carriers to eliminate this practice, thereby opening foreign markets for U.S. manufacturers. It is wholly unrealistic to believe that the United States could continue to challenge this practice abroad if the Commission were to allow it to be reintroduced in the United States.

⁶⁹ Cf. GATT Panel Rept., Follow-up on the Panel Report "European Economic Community-Payments and Subsidies Paid to Processors and Producers of Oil Seeds and Related Animal-Feed Proteins", GATT Doc. DS28/R, at 63-64, ¶ 81 (31 Mar. 1992) (member country may not take measures that render GATT rights "meaningless" by eliminating the economic benefit of exercising the right).

⁷⁰ See IDCMA Comments at 31-32.

CONCLUSION

As an administrative agency, the Commission has the right to alter long-established policies. When it does so, however, it must base its decision on the record before it. In the present case, the parties supporting elimination of the No-Bundling Rule in the interexchange market have not provided any adequate justification for their position. In contrast, IDCMA, CERC, and ITAA have demonstrated that allowing interexchange carriers to bundle CPE would be unlawful, reregulatory, and contrary to the public interest. The Commission simply cannot abandon one of the most successful policies in its history on the basis of the record before it.

Respectfully submitted,

A handwritten signature in black ink, reading "Jonathan Jacob Nadler". The signature is written in a cursive style and is positioned above a horizontal line.

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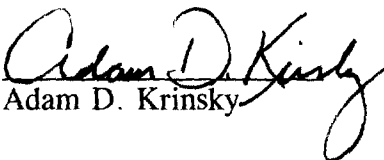
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May 24, 1996

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